1962

Audrey K. Masters v. Maxine LeSeuer : Brief of Defendant and Appellant

Utah Supreme Court

Norman Wade; Attorney for Appellant and Defendant;

IN THE SUPREME COURT OF THE STATE OF UTAH

AUDREY K. MASTERS,
Plaintiff and Respondent,

vs.

MAXINE LeSEUER,
Defendant and Appellant.

Case No.
9574

BRIEF OF DEFENDANT AND APPELLANT

NORMAN WADE

Attorney for Appellant and Defendant.

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ing a difficult time making her payments on the property for this reason; that she therefore wanted her attorney to do what was necessary in order to get the payments up to date. In accordance with this information the defendant's attorney prepared a notice of default on the Uniform Real Estate Contract, and had the same served upon the plaintiff at her residence in the State of Washington. In response to this service, the plaintiff came to Salt Lake City and had a conference with defendant's attorney, after which it was determined how much was due and owing on the contract; and plaintiff informed defendant's attorney that she would take care of this matter within a very short time. Nothing was ever done on it after this conference; whereupon the plaintiff herein was served with a notice of repossession of the property in accordance with the contract between the two parties.

According to the file of this case, the plaintiff thereafter contacted a Salt Lake City attorney, and on the 7th day of July, 1961, commenced this action by service of summons upon the defendant, the action concerning this property. The defendant, within four or five days thereafter, delivered the said summons and complaint to the office of her attorney, Norman Wade, and requested that the attorney to protect her interest in the matter. These said papers were inadvertently and mistakenly set aside, and the attorney for the defendant herein was under the impression that an answer to the complaint had been prepared and filed within the proper twenty-day period. The attorney believed that said matter had

been taken care of and that the defendant's interests were protected. On the first day of September, 1961, the defendant called her attorney, Norman Wade, and asked him why her interests had not been protected, stating that a judgment had been entered against her. Thereafter, the attorney checked with the County Clerk's Office and confirmed this fact.

On the 11th day of September, 1961, defendant's attorney filed a motion to set aside the default judgment, along with an affidavit and answer to the case, which papers are on file in the record. The said motion to set aside the default judgment was heard by the Court and the Court denied the said motion; and defendant herein appeals from the said Court's denial of the motion to set aside the default judgment.

STATEMENT OF POINTS

POINT I. THE DISTRICT COURT ERRED IN ITS DENIAL OF DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT ON FILE HEREIN.

ARGUMENT

POINT I. THE DISTRICT COURT ERRED IN ITS DENIAL OF DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT ON FILE HEREIN.

The defendant's motion, as seen from the papers in the file, was made in accordance with Rule 60(b) of the Utah Rules of Civil Procedure which reads as follows:

> ***"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud, etc.*** **On motion and upon such terms as are just the Court may, in furtherance of justice, relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect . . . The motion shall be made within a reasonable time and for reasons 1, 2, 3 or 4, not more than three months after judgment, order or proceeding was entered or taken . . . "**

As the Utah Supreme Court pointed out in the case of Echo Ney, Trustees, Wasatch Homes, Inc. vs. G. T. Harrison and Alda J. Harrison, 299 Pac 2d, 114, Rule 60(b), is substantially the same as former Section 104-14-40 Utah Code Annotated, 1943; and Revised Statutes of 1898, Section 3005; and 2 Compiled laws 1888, Section 3200; compiled laws of 1876, Section 1293, page 417; and therefore we have a substantial number of cases which have been tried in Utah which give us the principles the Court should keep in mind in determining whether the default judgment should be set aside or not. Federal Rule 60(b) is substantially the same as the Utah Rules of Civil Procedure 60(b). As a matter of fact, the Utah Rule was taken from it. The only difference between the rules are these: (1) Utah Rules list as separate reasons for setting aside the judgment, "(4) when, for any cause, the summons in an action has not

been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." Federal Rule 60(b) has no such separate reason listed. (2) For reasons 1, 2, 3 and 4, Utah has a three month time limit while the Federal Rule has a one year time limit. This motion to set aside the judgment in this case was made under the Section 1, of the Utah Rules of Civil Procedure; and therefore the three-month time limit is applicable. However, the motion to set aside the judgment was made well within that three months time limit and was made as soon as was possible after the defendant was aware that a default judgment had been taken against her.

The purpose of Rule 60(b) when it was first enacted, along with its Utah predecessors, (see above), and at the present time, is to give defendants who have a valid and bona fide defense against plaintiff's cause of action, relief from default judgment and to allow cases to be tried on their merits. Hund vs. Ford, 74 Utah 46, 276 Pac. 908; Echo Ney vs. G. T. Harrison and Alda J. Harrison, ... Utah ....., 299 Pac. 2d 114; Warren vs. Dixon Ranch Co., ... Utah ....., 260 Pac 2d 741; Ellington vs. Miln, 18 F.R. Service, 606 .24 Case 1, 1953; Erich Rios Bridoux vs. Eastern Airlines, 214 F. 2d 207, 19 F.R. Service 60b x 29 Case 2, 1951. See also the cases following.

In the Utah vase of Warren vs. Dixon Ranch Co., ... Utah ....., 260 Pac 2d 741, the Utah Supreme Court said:

> **"The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness**

> of enforcing a judgment which may occur through procedural dificulties, the wrongs of opposing party, or misfortunes, which prevent the presentation of a claim or defense. Rule 60(b) of Utah Rules of Civil Procedure outlines the situations wherein a party may be relieved from a final judgment . . . "

In that same case the Court said further:

> "Discretion must be exercised in furtherance of justice, and the Court will incline toward granting relief in a doubtful case to the end that the party may have a hearing."

See also Hund vs. Ford, 74 Utah 46, 276 Pac. 908.

In 1947 the Federal Circuit Court of Appeals, Eighth Circuit, said in Assman vs. Fleming, 159 Fed. 2nd, 332, 10 F.R. Service, 60b .25, Case 1:

> "It is elementary that courts favor the trial of causes of action upon their merits, and hence judgment by default or by confession are within the rule conferring power on courts to open or vacate their own judgments."

The court further said:

> "It must also be made to appear where the application is made by defendant that he has a meritorious defense to the action. If, however, there are adequate allegations of a meritorious defense, properly verified, no counter showing will be received to refute the allegations or merits presented by the moving party."

In the case of Tozar vs. harles A. Krause Milling Co., 179 Fed. 2d, 242, 1951, 15 F.R. Service, 60b

.24, Case 1, the United States Court of Appeals for the Third Circuit said:

> **"Matters should not be determined by default judgments if it can be reasonably avoided. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits."**

In the case of 'In the Matter of the Estate of Cremidas' 18 Fed. Reserve Service 60b x 29, Case 3, 14 F.R.D. 15, Alaska, 1953, the Court held that relief from judgments and orders is in the discretion of the Court and that discretion should ordinarily incline toward granting relief, especially if no intervening rights have attached in reliance upon judgment and on actual injustice will ensue. Relief should be granted where a litigant has not been afforded an opportunity to have his case decided on the merits, as where it is alleged and not denied that the moving party's lawyer was intoxicated at the time of the hearing and unable to present party's case.

The Utah Courts have consistently followed the principles laid down by the Federal Courts in the cases quoted above from early times up until the present. This can be seen from the following quotations from the Utah Supreme Court:

On June 30, 1898, the Utah Supreme Court said in Utah Commercial and Savings Bank vs. Trumbo, 17 Utah 189, 53 Pac. 1033:

> **"The policy of the law is that every man shall have his day in court before judgment shall be entered against him, and where a judgment by default has**

> been entered, and within a proper time a good defense to the action in which the judgment was entered was made to appear, the default will be vacated, and the judgment set aside to permit trial on the merits, or the circumstances which led to the default are such as to cause the court to hesitate, it is better to resove the doubt in favor of the application, so that a trial may be secured on the merits."

On June 11, 1907, in the case of Cutler vs. Haycock, 2 Utah, 354, 90 Pac. 897, the Utah Supreme Court reversed judgment of the trial court because it had abused its discretion in refusing to set aside a verdict and said:

> "As has been well said, in all doubtful cases the general rule of courts is to incline towards granting relief from default, and to bring about a judgment on the merits. This rule, as appears from authorities, is of almost universal application . . . "

On this point see also Vol. I, Black on Judgments, Section 354; Cameron vs. Carroll, 67 Cal 500, 8 Pac. 45; Wolfe vs. Canadian Pacific Railroad, 89 Cal 332, 26 Pac. 825; and Weston vs. S. F. & B. Ry. Co., 41 Cal 17.

In August of 1953, the Utah Court made the statement in Warren vs. Dixon Ranch Company, quoted earlier in this brief.

These principles of the Utah Court have been affirmed right up to the present time, as can be seen from the case of Echo Ney, Trustee, Wasatch Homes, Inc. vs. G. T. Harrison and Alda J. Harrison, ... Utah ..... 299 Pac. 2d 114, decided in July of 1956. In that case the Utah Court cites 68-3-2, Utah Code Annotat-

ed 1953, which says that all Court cites 68-3-2, Utah Code Annotated 1953, which says that all provisions are to be construed liberally with a view to effect the objects of the statutes and to promote justice. The Court further says in that case, "The statutory authority has been liberally construed to the end that there be trial on the merits beginning with our earliest decisions." The Court then went on to reaffirm the opinion in Warren vs. Dixon Ranch Co. In that particular case the Utah Court held that eleven months after default judgment was rendered was within a reasonable time requirement, as of Rule 60(b) Utah Rules of Civil Procedure.

From the above citations and quotations, the following rules can be determined for a trial court to follow in ruling under 60(b), Utah Rules of Civil Procedure.

1. Relief from judgments and orders is within the discretion of the trial court. Echo Ney vs. Harrison, supra; Warren vs. Dixon Ranch Co., 260 Pac 2d, 741; Utah Commercial & Savings Bank vs. Trumbo, 1898, 17 Utah 189 and 53 Pac. 1033; Cutler vs. Haycock, 1907, 32 Utah, 354, 90 Pac. 897.

2. This discretion should be used in the furtherance of justice and equity. Echo Ney vs. Harrison, supra; Warren vs. Dixon Rancho Co., 260 Pac. 2d, 741; Commercial Savings Bank vs. Trumbo, 1898, 17 Utah 189, 53 Pac. 1033; Cutler vs. Haycock, 1907, 32 Utah 354, 90 Pac. 897.

3. The court favors trial of all causes of action on their merits. Echo Ney vs. Harrison, supra; War-

ren vs. Dixon Ranch Co., supra; Utah Commercial Savings Bank vs. Trumbo, supra; Cutler vs. Haycock, supra; Assman vs. Fleming, 159 Fed. 2nd, 332, 10 F.R. Service, 60b, 25, Case 1. Tozar vs. Charles A. Krause Milling Co., 179 Fed. 2nd, 242, 15 F.R. Service, 60b .24, Case 1.

4. If a meritorious defense is shown and there are no intervening equities, the court should be liberal in determining what is a justifiable excuse for allowing a default to be taken. All of the above cases cited hold this.

5. **All doubt which the court may have as to whether or not a default judgment should be set aside should be resolved in favor of the defendant, so that the trial of the case on its merits may be had.** (All cases cited above.)

6. Decisions of the trial court under Rule 60(b) will not be upset by an appellate court, unless abuse of discretion is clearly shown. Echo Ney vs. Harrison, supra; Warren vs. Dixon Ranch Co., supra.

In accordance with these principles it can be seen that the trial court did abuse its discretion. The answer on file in this case definitely and clearly stated a defense to the action which was brought by the plaintiff. The affidavit of defendant's attorney states that it was just a mistake and inadvertence which caused that the answer was not filed within the proper time, as defined by the rules. This case ought to be tried on its merits. The court ought to have evidence in front of it with which to determine the issues of the case; and no party would be done

an injustice in having the case tried on its merits. Under the facts, as before this court, the defendant in this case would be done a complete injustice if she were not allowed to present her side of the case to the court. She, in accordance with the summons served upon her, within the allowable time sent the said summons to a licensed practicing attorney oi Salt Lake County, which attorney had knowledge of the defense which she had to the said case, and she trusted the said attorney to represent her and protect her interests, and give her a chance to get into court to present her defense to the case. The attorney, through inadvertence, failed to do this, but just as soon as it was made known to the defendant, she again called her attorney, and the attorney prepared a motion to vacate and set aside the said judgment.

CONCLUSION

It is clear that in this present case that if justice is to be done, the defendant should have her day in court and be allowed to present her defense to the case which plaintiff brought against her.

For these reasons, the District Court's failure to set aside the default judgment should be set aside.

Respectfully submitted by:

NORMAN WADE

Attorney for Appellant and Defendant.